IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

SA.No. 730 of 1994(])

AS.4/1991 of ADDL.SUB COURT, KOCHI DATED 15/03/1993
OS.728/1988 of ADDL.MUNSIFF COURT,KOCHI
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APPELLANT: APPELLANT:PLAINTIFF:

LITTLE FLOWER KURIES AND ENTERPRISES LTD.,
A COMPANY REGISTERED UNDER THE COMPANIES ACT OF 1956 HAVING ITS REGISTERED OFFICE AT FORT COCHIN AND BRANCH AT BANGALORE.

BY ADV. SRI.V.O.JOHN

RESPONDENTS:RESPONDENTS:DEFENDANTS:
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1. **M.K.PONNAN, AGED 33, S/O.KESAVAN, IIND GRADE OPERATOR, H.I.L., UDYOGAMANDAL, RESIDING AT KALAPPURACKAL HOUSE, H.NO.23/802, PALLURUTHY, RAMESWARAM VILLAGE.**

2. **M.N.RADHAKRISHNAN, 31 YEARS, S/O.NARAYANAN NAIR, HELPER, B.NO.1535, H.I.L. UDYOGAMANDAL, RESIDING AT PANDARAKOTTIL HOUSE, H.NO.IV/321, KEEZHILLAM, RAYAMANGALAM PANCHAYATH.**

3. **K.A.JOHN, AGED 33, S/O.ANTONY, HELPER, B.NO.1696, H.I.L., UDYOGAMANDAL, RESIDING AT H.NO.44/789, KALLUVEETTIL HOUSE, VADUTHALA, KANAYANNUR TALUK.**

4. **K.S.THANKAPPAN, AGED 37, S/O. SANKARAN, MAZDOOR, B.NO.9780, KELTRON CONTROL DIVISION, AROOR, RESIDING AT H.NO.42/326, KARIKKANAPARAMBU, PATTANAKKAD PANCHAYATH.**

BY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 730 OF 1994

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DATED THIS THE 4th DAY OF JULY, 2007

JUDGMENT

Plaintiff in O.S. 728 of 1988 on the file of Munsiff Court, Kochi is the appellant. Respondents are defendants. Appellant instituted the suit seeking a decree for realisation of Rs.9380/- with interest on the principal amount of Rs.7000/- alleging that the amount is due from all defendants jointly and severally. Respondents 2 to 4, who were defendants 2 to 4, remained absent and were set exparte. First respondent/first defendant alone filed a written statement. Subsequently first respondent withdrew his contentions. Thereafter Munsiff passed a decree in favour of appellant, but only against first respondent. Appellant challenged the non-granting of the decree as against respondents 2 to 4 before Sub Court, Kochi in A.S.4 of 1991. Learned Sub Judge dismissed the appeal holding that the prayer was for a remand to grant opportunity to adduce evidence but appellant was not present when the decree was granted and therefore opportunity cannot be granted. It is challenged in the second appeal.

2. The second appeal was admitted formulating the

following substantial question of law

1)When defendants 2 to 4 remained absent and were set exparte and first defendant withdrew the contentions raised in the suit was the courts below justified in not granting a decree against defendants 2 to 4.

3. First respondent who alone appeared before the trial court, later withdrew his contentions and did not challenge the decree passed against him. He did not even prefer a cross-objection challenging the decree granted in his favour in the first appeal and though the decree was confirmed, he did not challenge it thereafter also. The only question is whether courts were justified in not granting a decree in favour of respondents 2 to 4, who did not appear or contest the suit.

4. Admittedly no evidence was adduced before the trial court. Without adducing evidence, plaintiff is not entitled to get a decree against the defendants, even if the defendants were set exparte. Decree was granted as against first defendant as he appeared and withdrew the contentions. Case of the appellant is that he did not get opportunity to adduce evidence as against defendants 2 to 4. It is for that purpose an opportunity was sought for in A.S.4 of 1991. Learned Sub Judge did not grant

him the opportunity.

5. The facts of the case reveal that defendants 2 to 4 did not contest the case. They did not appear even though summons were served on them. They did not appear either in the first appeal or second appeal. When defendants 2 to 4 did not contest the suit and did not dispute the allegations raised against them, trial court should have at least considered the question whether plaintiff is entitled to get a decree against them and if not, should have recorded the reasons. The trial court did not do so. Even though that was challenged before the first appellate court, first appellate court also did not consider on what ground plaintiff is not entitled to get a decree as against defendants 2 to 4. True, evidence was not adduced. It is for that purpose opportunity was sought for by appellant. In such circumstances first appellate court should have granted an opportunity to the appellant to adduce evidence as against defendants 2 to 4. As it is not granted, the decree and judgment passed by Munsiff Court, Kochi as against defendants is to be set aside and the suit is to be remanded for fresh disposal.

6. The second appeal is allowed. The decree and judgment passed in O.S.728 of 1988 as confirmed in A.S.4 of 1991 is set aside as against defendants 2 to 4. The suit as against them is remanded to the trial court for fresh disposal, after affording an opportunity to the plaintiff to prove the case as against defendants 2 to 4. Parties are directed to appear before the Munsiff Court, Kochi on 2.8.2007.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-